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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES, *et al.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. UNITED STATES BUSINESS HAS A VITAL INTEREST IN THE STANDARDS APPLICABLE TO INTERACTIVE COMPUTER SERVICES	4
A. All Industries Are Now Information Technology Industries	5
B. The Ability To Use State-Of-The-Art Information Technology Unfettered By Government Intrusiveness Is Essential To American Competitiveness	8
II. THE STANDARDS OF LIABILITY OF THE COMMUNICATIONS DECENCY ACT ARE CONSTITUTIONALLY INADEQUATE AND THREATEN TO PENALIZE PERMISSIBLE COMMUNICATIONS	9
A. The CDA's Intrusiveness Is Inconsistent With The Freedom That Has Characterized Interactive Media Communications	10
B. The Standards Of The Communications Decency Act Are Excessively Broad And Vague	12
C. The Statutory Defenses Are Not Feasible Technologically Or Economically, Or Are Simply Inapplicable To Business Communications	20
CONCLUSION	25

TABLE OF AUTHORITIES

CASES — Page

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 14, 15
Butler v. Michigan, 352 U.S. 380 (1957) 15
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 19
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) .. 12
Field v. Mans, 116 S. Ct. 437 (1995) 14
Ginsberg v. New York, 390 U.S. 629 (1968) 18
Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 14
Russello v. United States, 464 U.S. 16 (1983) 14
Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 15
Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *appeal pending*, No. 96-595 18
United States v. Thomas, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) 10

STATUTES AND LEGISLATIVE MATERIALS

47 U.S.C. § 223 ..... *passim*
47 U.S.C. § 230 4
The Communications Decency Act, Pub. L. No. 104-104, § 502, 110 Stat. 56 (1996) 3
The Conference Report on S. 652, Telecommunications Act of 1996, H. Rep. 104-458 (Jan. 31, 1996) 17, 18
142 Cong. Rec. H1145 (daily ed. Feb. 1, 1996) 18

MISCELLANEOUS

American Electronics Association/American University, *Internet Commerce* (Sept. 1996) 7
Center for Democracy and Technology, *CDT Policy Post Number 31* (Dec. 4, 1995) <http://www.cdt.org/publications/pp311204.html> 18
Electronic Messaging Association, *EMA Market Research Survey* (1996) 5, 6, 13
Health Insurance Association of America, *Source Book of Health Insurance Data 1995* (1996) 15

TABLE OF AUTHORITIES—Continued

Page

The President's Information Infrastructure Task Force, *A Framework for Global Electronic Commerce* (Dec. 11, 1996) <http://www.iitf.nist.gov/eleccomm/glo_comm.htm> 7
The President's Information Infrastructure Task Force, Executive Summary, *A Framework for Global Electronic Commerce* (Dec. 11, 1996) <http://www.iitf.nist.gov/eleccomm/exec_sum.htm> 9
U.S. Chamber of Commerce & Ernst & Young LLP, *The Business Users' Perspective on the National Information Infrastructure* (1995) 5

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

Pursuant to Rule 37, the Chamber of Commerce of the United States of America respectfully submits this brief *amicus curiae* in support of appellees.[1]

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector, and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees.

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[1] Counsel for both appellants and appellees have consented to the participation of amicus in this case, as evidenced in letters on file with the Court. The law firm representing amicus also has served as one of the counsel for appellee Prodigy Services Company in this litigation.

American businesses are among the largest users of information technology products and services, and constitute a core constituency of interactive computer service providers and users. Accordingly, they are deeply interested in the legal standards that govern permissible communications on computer networks. American businesses have an especially strong concern about statutes, such as the Communications Decency Act, that impose criminal penalties based on the content of communications transmitted or displayed on interactive computer services.

INTRODUCTION AND SUMMARY OF ARGUMENT

The development of interactive computer services—and the Internet in particular—has sparked an information explosion. It has resulted in the development of an unprecedented, seamless, instantaneous web of global communications. Government intrusiveness into communications on this vital medium threatens to stifle the evolution and efficacy of this information infrastructure and the competitiveness of American business. The imposition of sweeping *criminal* penalties based on the content of communications on these networks, under extremely broad and imprecise statutory standards, would produce a chilling effect on business use of online communications, and severely threaten the development of this important infrastructure.

American businesses have a critical interest in ensuring that standards of liability governing communications on interactive computer services, including both the Internet and private networks, do not interfere with the vitality and freedom that are crucial to business performance and competitiveness in this emerging medium. Increasingly, all industries are information technology industries. The business use of computers and online systems is growing at an unprecedented rate. The rapid growth of the Internet and interactive computer communications as vehicles for intra-corporate and intercorporate communications, marketing, advertising, and electronic commerce, has

made the goal of preserving these media free of stifling government interference critical to American business. The ability to use state-of-the-art information technology unfettered by government intervention and economically onerous requirements is essential to American competitiveness and efficiency. American businesses must not be burdened by government controls on speech that put them at a serious disadvantage in the global market.

The Communications Decency Act ("CDA"), Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996) (to be codified at 47 U.S.C. § 223), would jeopardize the computer communications that are increasingly crucial to American businesses. The CDA would impose a criminal felony penalty of up to two years in prison and a substantial fine for "indecent" or "patently offensive" computer communications or displays, as determined "in context" and by "contemporary community standards," that are transmitted or "display[ed] in a manner available" to those under 18 years of age. 47 U.S.C. §§ 223(a) & (d). These standards of criminal liability are excessively broad and vague. The Act would ignore the decentralized nature of the Internet and other interactive networks, impose "command and control" style censorship on all interactive computer communications, and threaten a wide range of legitimate business communications. Moreover, the CDA's intrusiveness and constitutional infirmities are not rescued by its defenses, which are not feasible technologically or economically for businesses in many circumstances and which similarly rely upon inadequately defined standards.

The government interference proposed by the CDA, unprecedented in its intrusion on this medium and in its application to a virtually limitless range of communications, thus would have a stultifying effect on the development of this critical resource and the competitiveness of American business interests. The Chamber of Commerce of the United States strongly supports the objective of protecting children. Regrettably, however, the CDA is not

crafted with sufficient precision or narrowness to serve the government's asserted objective in a constitutionally permissible manner.

ARGUMENT

I. UNITED STATES BUSINESS HAS A VITAL INTEREST IN THE STANDARDS APPLICABLE TO INTERACTIVE COMPUTER SERVICES.

In order to understand the importance of maintaining a free flow of communications on the Internet and other interactive computer services, it is essential to understand two central characteristics concerning the role of American businesses in the online computer environment. First, because of the increasing penetration of interactive computer communications in every industry sector, virtually all businesses have a substantial interest in such communications. Second, because of the global reach of computer communications and the prevalence of such communications in industries worldwide, interactive computer communications are increasingly vital to American businesses competing in the global economic market. Particularly because of the decentralized nature of the Internet and other online communications, government intrusion would have a harmful impact on essential business communications and American competitiveness.[2]

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[2] Section 223(d) of the Communications Decency Act applies to all "interactive computer service[s]," 47 U.S.C. § 223(d); the Act defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). Section 223(a) of the Act applies to communications made by "telecommunications device," 47 U.S.C. § 223(a); the lower court concluded that "telecommunications device" as used in the Act includes a computer modem. *ACLU v. Reno*, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996).

A. All Industries Are Now Information Technology Industries.

Interactive computer services play at least three fundamental roles for American businesses: (1) a medium for communications within the workplace; (2) a medium for communications regarding industry information and developments; and (3) a medium for commerce.

With respect to communications in the workplace, the use of interactive computer services has grown—and continues to grow—dramatically. The number of Americans employing electronic messaging in the workplace has been estimated at over 37 million.[3] By the year 2000, over 82 million Americans, connected by over 18 million computer systems, both independent and interconnected, will communicate by electronic messaging in the workplace.[4] A 1995 survey by the Chamber of Commerce's Telecommunications Infrastructure Task Force of thousands of large and small business users from all 50 states and diverse industry sectors—the most comprehensive study of business computer use ever undertaken—revealed that fully 95% of the respondent businesses used computer workstations; 74% had computer modems.[5] 81% of the respondent businesses anticipated using electronic mail within five years; 39% used electronic mail in the workplace already.[6] Increasingly, "virtual offices" via online computer systems are replacing bricks and mortar, and small businesses are using this technology to form "virtual corporations" to compete against larger corporations.

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[3] Electronic Messaging Association, *EMA Market Research Survey* 47 (1996).

[4] *Id.*

[5] U.S. Chamber of Commerce & Ernst & Young LLP, *The Business Users' Perspective on the National Information Infrastructure* 10 (1995).

[6] *Id.* at 13.

Interactive computer systems for intra-corporate communications are becoming the norm in almost all industries. Corporate communications range from the dissemination of official corporate policies to internal business discussions and information transfers to informal workplace conversation; in addition to their other functions, interactive computer services are replacing the office "water coolers" of the past.[7]

Numerous American businesses, both large and small, employ 17-year olds and 16-year olds for a wide variety of tasks and permit these employees to have access to corporate communications networks. In addition to specific employment-related tasks, business has a vital interest in the education of American youth and its future workforce. The technologically driven workplace of the 21st century will demand computer-literate workers.

With respect to external communications, businesses are increasingly interconnected to other online networks, such as industry networks and external information providers. Industries stay apace of daily developments and emerging trends through the use of World Wide Web sites, electronic bulletin boards, automatic mailing list services ("listservs"), intercorporate communications, consumer e-mail, and chatrooms.[8] Businesses increasingly offer employees direct access to the Internet and other online networks. By providing access to such information, businesses secure the availability of an almost infinite amount of knowledge and communications; by transmitting information on such networks, businesses make information—

[7] Intra-corporate computer communications also are the communications lifeline of the increasing number of employees who "telecommute." Electronic Messaging Association, *EMA Market Research Survey*, at 48-50.

[8] The Chamber of Commerce of the United States itself maintains a website providing a wide variety of information about policies and programs to members and non-members. <http://www.uschamber.org>.

and, increasingly, commercial interaction—available to a similarly limitless audience.[9]

With respect to commerce and marketing, interactive computer systems are becoming a marketplace of choice for a wide range of companies and consumers, providing fora for marketing, advertising, and increasingly, direct commerce. Indeed, a recent government study estimated that $200 million in commerce was conducted over the Internet in 1995, with a likelihood of billions of dollars in commerce by the turn of the century.[10] In addition to transactions for the exchange of tangible goods, the marketplace for "content" such as software, online publications, and audio and audiovisual recordings likewise will develop and expand. Although certain transactions take place by credit card, the future of cyber-commerce likely also will include the use of "cybercash," a new form of digital currency. Significantly, numerous electronic commerce communications involve no financial transactions.

This dependence on computer communications is not confined to any type of industry or size of business. Users of computer communications reflect the proliferation of technology in virtually every industry sector, such as

[9] As the district court found, "Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields." *ACLU v. Reno*, 929 F. Supp. at 832-33, Finding of Fact ¶ 14.

[10] The President's Information Infrastructure Task Force, *A Framework for Global Electronic Commerce* 2 (Dec. 11, 1996) (citing American Electronics Association/American University, *Internet Commerce* (Sept. 1996)) <http://www.iitf.nist.gov/elec-comm/glo_comm.htm>.

health care, general retail, finance, manufacturing, aerospace, transportation, and energy. Businesses dependent on information technology range from the largest Fortune 500 companies to the smallest entrepreneurs. Indeed, in light of the low barriers to access presented by such networks as the Internet, reliance on interactive computer services is especially important for start-up ventures and new competitors.[11]

Finally, in addition to extensively using interactive computer systems, American businesses also produce the hardware and software that drive the Internet. Domestic businesses are at the worldwide forefront of all phases of Internet technology, including software development, computer manufacturing, local and network messaging, and global public and private network services.

B. The Ability To Use State-Of-The-Art Information Technology Unfettered By Government Intrusiveness Is Essential To American Competitiveness.

The global computer network places American businesses in immediate communication with businesses and consumers around the world. Logging on to the Internet provides instant access to computer sites and individual computers across the globe. This characteristic of interactive computer communications offers tremendous potential for reducing business transaction costs and expanding markets from a local to a global scale. Approximately 40% of host computers worldwide are located outside of the United States.[12]

Government intrusion threatens to disrupt and impede participation in this global medium and in international

[11] *See, e.g., ACLU v. Reno*, 929 F. Supp. at 843, Finding of Fact ¶ 76 ("[T]he Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication.").

[12] *ACLU v. Reno*, 929 F. Supp. at 831, Finding of Fact ¶ 3.

trade. Indeed, the federal government itself recently recognized this fundamental principle. The proposed "Framework for Global Electronic Commerce"—a collaborative effort by a broad range of departments and agencies in the Executive Branch—expressly recognizes the importance of limiting government intrusion in the Internet. The Framework identifies, as a major potential obstacle to American commercial development and utilization of interactive computer networks such as the Internet, "the possibility that governments will impose disparate and extensive regulations on the Internet . . . such as . . . content restrictions" and "the lack of a predictable legal environment governing transactions and resulting concerns about . . . liability."[13] Rather than command-and-control content restrictions, the Framework embraces a "non-regulatory, market-oriented approach to electronic commerce," and supports "[e]mpowering consumers to manage questions of content."[14]

As the federal government's own proposed "Framework" recognizes, in light of the seamless nature of global computer communications, government intrusiveness, particularly into content, impedes participation in the global medium, and shackles the competitiveness of American business.

II. THE STANDARDS OF LIABILITY OF THE COMMUNICATIONS DECENCY ACT ARE CONSTITUTIONALLY INADEQUATE AND THREATEN TO PENALIZE PERMISSIBLE COMMUNICATIONS.

In light of their extensive use of, and dependence on, online computer networks, the Communications Decency Act raises grave concerns for American businesses. First, the unprecedented scope of the government intrusion reflected in the CDA is fundamentally antithetical to the

[13] The President's Information Infrastructure Task Force, Executive Summary, *A Framework For Global Electronic Commerce* 1 (Sept. 1996) <http://www.iitf.nist.gov/eleccomm/exec_sum.htm>.

[14] *Id.* at 2.

freedom that has permitted the phenomenal growth of this medium. Second, the broad and vague standards adopted by the CDA are paradigms for the type of regulation that can cripple business operations and that cannot withstand constitutional scrutiny. Third, the defenses in the statute are inadequate to salvage its constitutionality.

A. The CDA's Intrusiveness Is Inconsistent With The Freedom That Has Characterized Interactive Media Communications.

The Internet and other online computer networks have flourished in an environment of liberty and free speech.[15] As the district court found, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *ACLU v. Reno*, 929 F. Supp. at 842, Finding of Fact ¶ 74. The district court also emphasized that this explosion of knowledge and information has resulted from a decentralized system, and the absence of centralized authority censoring content. "No single entity—academic, corporate, governmental, or non-profit—administers the Internet. . . . There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet." *Id.* at 832, Finding of Fact ¶ 11.[16]

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[15] As with other media, criminal prohibitions against obscenity and child pornography apply to interactive computer services (*see, e.g., United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) (obscenity prosecution)). The Chamber of Commerce fully supports the criminal prohibitions against obscenity and child pornography, which are *not* at issue in this case. *See ACLU v. Reno*, 929 F. Supp. at 829.

[16] *See also ACLU v. Reno*, 929 F. Supp. at 838, Finding of Fact ¶ 46 ("Running on tens of thousands of individual computers on the Internet, the [World Wide] Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.").

Thus, the genius and defining characteristic of this system has been its openness and accessibility.

In sharp contrast, the CDA creates the unprecedented prospect of criminal liability, punishable as a felony by up to two years in prison and substantial fines, for particular computer communications or displays that a federal prosecutor in an unknown jurisdiction may deem "indecent" or "patently offensive." Specifically, the CDA prohibits the transmission of material that is "indecent" to individuals under the age of 18 by a "telecommunications device" (47 U.S.C. § 223(a)(1)(B)); the use of an interactive computer service to send or "display in a manner available to" those under 18, material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication" (47 U.S.C. § 223(d)(1)); and any knowingly "permit[ted]" use of a telecommunications facility for such purposes (47 U.S.C. §§ 223(a)(2) & 223(d)(2)).

The CDA thus represents government intrusion into online computer use on a massive scale and under a broad and undefined standard. The only interactive computer communications at issue are communications that are entirely permissible between adults—as noted, the challenge to the statute does *not* address such material as obscenity, which is prohibited for all persons. Depending on how individual prosecutors and juries interpret such concepts as "context," "contemporary community standards," and "patently offensive," moreover, the statute could apply to a wide range of socially beneficial, interactive computer communications, including subjects such as information about AIDS, breast cancer, serious literature,

discussion of the "seven dirty words" in this Court's *Pacifica* decision (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)), and material in the Carnegie Library's online collection. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 853 (Sloviter, C.J.); *id.* at 871 (Dalzell, J.).

Thus, even before addressing the particular difficulties with the CDA's standard of criminal liability, it is important to recognize that the broad and intrusive restriction imposed by the CDA is fundamentally hostile to the freedom and openness that have characterized the Internet and other online networks.

B. The Standards Of The Communications Decency Act Are Excessively Broad And Vague.

American businesses represented by the Chamber of Commerce are responsible corporate citizens who wish to comply fully with the law. In order to do so, however, the standards for criminal prohibitions must be clear and readily ascertainable to businesses large and small. Moreover, the criminal standards must be sufficiently narrow to ensure that permissible communications are not at risk.

The scope of criminal prohibitions of the CDA encompasses potentially every communication—internal or external—that businesses make by computer. Almost every electronic message sent by computer is potentially accessible by persons under 18 and hence subjects the sender to potential liability. Similarly, any material posted to a website, listserv, or electronic bulletin board, or otherwise made available within a company, an industry, or to the general public, could subject the sender to liability. Material retrieved from the Internet or other systems and placed on a company system also could prompt liability.[17]

Indeed, United States businesses originated an estimated 350 *billion* interactive computer communications in 1996,

[17] For example, providing employees with access to infringing domestic or foreign material, such as graphic medical research, could give rise to liability.

a figure which grows with each passing year.[18] The sheer volume and diversity of origins of such communications make universal monitoring impossible.

The nature of interactive computer communications also renders the need for certain, bright-line standards of potential liability crucial. Interactive computer communications typically take place directly between users, without the intervention of administrators or overseers, and often take place in or in close proximity to "real time." For this reason as well, the vast majority of the hundreds of millions of messages that cross interactive computer services each day are not, and cannot be, "screened," much less fully reviewed by legal counsel. It is simply infeasible for the millions of business users to make judgments involving complicated analyses of legal standards of "indecency" or "patently offensive" material under "contemporary community standards" and apply those standards to interactive computer communications prior to each such communication. Nevertheless, under the CDA, businesses would face potential criminal liability for the available display of such messages, and business managers could face up to two years in prison.[19]

Indeed, the vagueness and overbreadth of liability under the CDA are clearly illustrated by the striking inability of government attorneys and expert witnesses to tell the lower court whether particular examples

[18] Electronic Messaging Association, *EMA Market Research Survey*, at 45. By the year 2000, an estimated 1.2 trillion domestic interactive computer business communications will be sent annually. *Id.*

[19] We note that the parties and *amici* have devoted hundreds of pages to interpretation of the standard of liability under the two provisions at issue here, including the meaning of "patently offensive as measured by contemporary community standards." In view of both the volume of messages on interactive computer services and their often "real time" nature, employers are incapable of such analysis, much less its application on an a priori, message-by-message basis.

constituted infringing material under the CDA, much less whether local prosecutors or juries applying "community standards" nationwide would seek to criminalize such communications. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.). Despite the government's own inability to confirm whether specific examples meet the standard of liability under the CDA, businesses and their employees would be required to make such assessments, under pain of criminal liability.[20]

Furthermore, numerous businesses transmit discussions or visual depictions that might be considered "indecent" or "patently offensive" because of the nature of the product or topic of discussion involved. As recently as the 1980's for example, the federal government attempted to prohibit unsolicited mailing of contraceptive advertisements.[21] Companies providing information regarding similar products might be transmitting material considered "patently offensive" or indecent to certain communities or by certain prosecutors. Discussion of such conditions or treatments as breast and prostate cancer, reconstructive surgery, penile implants, digestive diseases and related

[20] The CDA's separate criminal prohibitions on "indecency" in section 223(a) and "patently offensive" material in section 223(d) contribute to the confusion created by the respective definitions. As Chief Judge Sloviter observed, although the case has been decided to this point on the assumption that the meanings of the provisions are identical, the term "indecent" is not defined in the CDA, "[n]or does section 223(a) contain the phrase 'in context'," which is contained in the section 223(d) "patently offensive" section. *ACLU v. Reno*, 929 F. Supp. at 850 (Sloviter, C.J.). "The failure to define 'indecent' in section 223(a) is thus arguably a negative pregnant and subject to the rule of construction" that the disparity in terms is intentional and is intended to convey a difference of intention in the respective statutory provisions. *Id.* at 850 (citing *Field v. Mans*, 116 S. Ct. 437, 442 (1995); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Russello v. United States*, 464 U.S. 16, 23 (1983)). *See also ACLU v. Reno*, 929 F. Supp. at 861 (Buckwalter, J.)

[21] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 61 (1983).

conditions, sexually transmitted diseases, contraceptives, birth control, and any other product or service relating to "sexual or excretory activities or organs" might be deemed "patently offensive," subjecting those responsible for such material to two years' imprisonment.[22] Advertising of such products or services, maintaining electronic bulletin boards, listservs, or discussion groups of problems related to such topics, and even transmitting of such information for purposes of telemedicine or education might be interpreted by some communities or prosecutors as indecent or patently offensive, despite (or because of) their "context"; even without originating such information, any business that "display[ed]" such material "in a manner available" to an individual under 18 would be at risk of criminal prosecution.[23]

Indeed, the CDA threatens one of the principal benefits of the Internet and interactive computer services: the rapid exchange of critical business information and ideas and the insights derived from displaying and communicating information, receiving responses, and developing discussions among interested, but previously unknown, participants. A researcher on the Internet, for example, might learn of a corporation's scientific or medical discovery in a field that relates to bodily functions, including sexual and excretory functions and organs, and respond with pertinent

[22] The use of interactive computer services by the health care industry is especially important; fully one-seventh of the nation's economy currently involves health care. Health Insurance Association of America, *Source Book of Health Insurance Data 1995* 6-7 (1996). The CDA could severely curtail increasing use of telemedicine, with social consequences for America's health and economic consequences for the health care industry.

[23] It is, of course, impermissible, as a result of concerns about access by minors, to effectively limit communications between adults to the level appropriate to children. *See, e.g., Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-27, 131 (1989); *Bolger*, 463 U.S. at 74; *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

and valuable information.[24] Such communication, which has great social value, is possible on interactive computer services only if there is broad accessibility to information and messages by an expansive audience of potential recipients. Such accessibility is threatened by the broad and vague standards of the CDA. In an environment of uncertainty regarding criminal liability, businesses will face strong incentives to minimize their risk to the greatest extent possible, even if that ultimately means pulling the plug on online systems.

As noted, moreover, numerous information technology-dependent companies employ 16-year olds and 17-year olds as interns or employees. *See* page 6, *supra*. The mere use of expletives in e-mail sent to or available to minor employees could subject such companies to liability.[25] Thus, an informal office "water cooler" conversation, if conducted instead by electronic mail, could land the speaker in prison for two years and subject the business to extensive liability. Similarly, displays available on company computer systems might incur liability. Business would face the dilemma of either banning young employees from office communications and denying them concomitant training and experience in computer technology, or facing potential criminal liability. The CDA thus would impose a chilling environment on businesses, forcing them to err on the side of exclusion to avoid uncertain liability, thereby depriving our nation's youth of the technological education and training they will need for career employment and depriving American businesses of a skilled and well-trained future workforce.

The government contends that the definitions of indecency and "patently offensive" are neither vague nor over-

[24] *Cf. ACLU v. Reno*, 929 F. Supp. at 832-33, Finding of Fact ¶ 14.

[25] An expert witness for the government opined that mere expletives could prompt criminal liability. *ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.).

broad because such definitions must be considered "in context." Gov't Br., 48-51. *See* 47 U.S.C. § 223(d)(1) (prohibiting display of material that "in context" is "patently offensive as measured by contemporary community standards"). The use of the modifier "in context" for the "patently offensive" definition, however, does not provide the requisite narrowness and clarity.[26] As Judge Buckwalter observed, the inclusion of that phrase, itself undefined, "does nothing to clarify the provision, for it fails to explain which context is relevant."[27] Significantly, however, it is clear that, "[u]nlike in the obscenity context, indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to prosecute publishers of such materials is without foundation in the law itself."[28]

The government's reliance on an explicit or implied limitation of liability to material "in context" is particularly unsettling for businesses. Does the "context" of a discussion on the World Wide Web render acceptable material that a prosecutor might otherwise find "patently offensive"? Does the "context" of a business communi-

[26] The "indecency" provision does not itself contain this limitation. *See* note 20, *supra; see also ACLU v. Reno*, 929 F. Supp. at 850 (Sloviter, C.J.).

[27] *ACLU v. Reno*, 929 F. Supp. at 864 (Buckwalter, J.); *see also id.* (noting that "'[c]ontext' may refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings.").

[28] *Id.* at 863. To the extent that the Conference report suggests that redeeming value would preclude coverage under the CDA, Conference Report on S. 652, Telecommunications Act of 1996, H. Rep. 104-458, at 189 (Jan. 31, 1996) ("Conf. Rep."), nothing in the criminal liability standard of the statute provides such a limit; indeed, the conferees explicitly rejected such a limitation, *see* note 29, *infra*, and neither the government nor its amici contend that redeeming value necessarily precludes criminal liability under the CDA. *See* Gov't Br. at 50; Br. of Amici Sen. Coats, *et al.*, at 13.

cation sent intra-company or inter-company that contains necessarily graphic material or potentially infringing expletives render it nonetheless acceptable?

Indeed, the breadth and vagueness of the criminal standards are especially clear in light of proposed limitations that Congress explicitly rejected. The conferees on the CDA expressly rejected a proposed limitation of liability to (i) material that is pornographic (*i.e.*, appealing to prurient interests) and (ii) material that "taken as a whole, lacks serious literary, artistic, political or scientific value."[29] To read such limitations into the legislation would require a wholesale rewriting of the CDA, which the lower court properly rejected as beyond the courts' prerogative.[30]

Far from providing any clarifying limitation, moreover, the statutory modifier "as measured by contemporary community standards" merely compounds the uncertainty and variability of the criminal liability standard. The nature of interactive computer communications makes it often impossible to determine the geographic origin or destination of communications. Furthermore, "[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community." *ACLU v. Reno*, 929 F. Supp. at 844, Finding of Fact ¶ 86. The

[29] The conferees rejected a "harmful to minors" standard, based on the Court's ruling in *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968), that would have limited liability under the CDA to a communication that (1) taken as a whole, appeals predominantly to the prurient interest of minors; (2) depicts, represents, or describes sexually oriented nudity or conduct in a patently offensive way, with respect to what is suitable for minors; and (3) taken as a whole, lacks serious literary, artistic, political or scientific value for minors. Conf. Rep. at 189; 142 Cong. Rec. H1145, H1165-66 (daily ed. Feb. 1, 1996) (statement of Rep. Berman); Center for Democracy and Technology, *CDT Policy Post Number 31* (Dec. 4, 1995) <http://www.cdt.org/publications/pp311204.html>.

[30] *ACLU v. Reno*, 929 F. Supp. at 854-55 (Sloviter, C.J.); *see also Shea v. Reno*, 930 F. Supp. 916, 949-50 (S.D.N.Y. 1996), *appeal pending*, No. 96-595.

seamless national, and indeed international, nature of interactive computer communications makes it far from certain which "contemporary community standards" are pertinent (and whether they are ascertainable). Facing such ambiguity, a prudent speaker or information host would attempt to limit speech to that acceptable in the most restrictive community in the nation (to the extent that such acceptability could be determined), thereby severely chilling discourse. Accordingly, the "contemporary community standards" requirement exacerbates the problems arising from the uncertainty and breadth of the criminal prohibition.

The CDA's vague and overbroad standards of liability also impinge on constitutionally protected messages or communications directed to minors such as 16-year olds and 17-year olds. For example, numerous online magazines and Websites are directed to teen readers, and frank discussion of issues such as teen pregnancy or sexually transmitted diseases might be deemed "indecent" or "patently offensive." The CDA's criminal prohibition of such speech thus is unconstitutional, not only on the basis of its effect on adult speech, but on the basis of its restriction of speech to certain minors as well.[31]

In sum, the CDA enacts an extremely broad and nebulous standard, threatening a wide range of business communications on interactive computer services. It is especially troubling that the CDA wields the club of criminal sanctions for such communications. The immediate effects of the CDA would be to unjustifiably inhibit communications on interactive computer services for

[31] *Cf. ACLU v. Reno*, 929 F. Supp. at 855 n.1 (Sloviter, C.J.) (observing that the CDA "probably covers speech protected by the First Amendment for some minors as well, because it fails to limit its reach to that which is harmful for minors," but concluding that the issue "is not necessary to decide in light of the other conclusions reached"); *see also, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

many businesses and to severely distort the use and development of this vital communications medium. The precedential effect of this form of criminal liability likewise would be especially grave. The CDA thus would have an unwarranted and harmful direct and precedential effect on American businesses who use and depend on information technology products and services, especially interactive computer services.

C. The Statutory Defenses Are Not Feasible Technologically Or Economically, Or Are Simply Inapplicable To Business Communications.

The CDA provides certain specified "defenses" to prosecution. 47 U.S.C. § 223(e). These defenses are inadequate to rescue the statute from constitutional infirmity and to provide the certainty required by the business community and other users.

The government has particularly emphasized two defenses. First, the CDA provides a defense if an actor has taken "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in [the liability sections], . . . including any method which is feasible under available technology." 47 U.S.C. § 223 (e)(5)(A). Second, the CDA provides a defense if an actor "has restricted access to such communication by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 223(e)(5)(B). These defenses cannot salvage the statute. At the outset, it must be recognized that these "defenses" are, in fact, exactly that—defenses to possible criminal prosecutions. The mere threat or possibility of criminal prosecution, however, will cause most law-abiding citizens, including American businesses, to attempt to steer far clear of possibly offending actions. "Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, nonprofit corporation, or even large, publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed." *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, C.J.).

Furthermore, even on their own terms, the defenses are inadequate. The CDA requires "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors." 47 U.S.C. § 223 (e)(5)(A). The district court specifically found as a fact, however, that "[t]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chatrooms." *ACLU v. Reno*, 929 F. Supp. at 845, Finding of Fact ¶ 90. The same is true of Websites available through large commercial online services. *Id.*, Finding of Fact ¶ 96. Thus the "effective" actions provision is not a meaningful defense; it is a mirage.[32]

Moreover, the requirement of "effective" and "appropriate actions under the circumstances . . . including any method which is feasible under available technology" is, at best, ambiguous and unclear. The statute does not specify what available technologies, if any, would satisfy these criteria. Tellingly, the government was unwilling or unable at trial to stipulate that *any* potential method of compliance would qualify for the defense. *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, C.J.). Facing criminal liability punishable by two years in prison and a substantial fine, reasonably prudent citizens, including businesses, would feel compelled to attempt to employ all

[32] Even in the limited circumstances in which attempted age verification might be technically feasible, such efforts would be extremely burdensome and would have little prospect of effectiveness. *See ACLU v. Reno*, 929 F. Supp. at 854 (Sloviter, C.J.).

available measures to restrict or prevent access by minors, in order to maximize their likelihood of successfully availing themselves of this defense. Such measures could include the most advanced available technologies in a constantly changing medium. As such, the defense would amount to a burdensome technological mandate, representing a crushing and continuing obligation for businesses. The rapid pace of technological development would likely require frequent purchases of new technology, installation of this technology, and training of employees. Such a requirement would impose an overwhelming financial responsibility on large and small businesses alike.

Similarly, the "verified credit card" or "adult access code" defense also is inadequate. First, numerous communications of commercial interest, even by and to businesses, do not involve commercial transactions. For example, discussions of products and services and advertisements do not involve a fee of any kind, and likewise would not be subject to the "verified credit card" defense. *ACLU v. Reno,* 929 F. Supp. at 846, 847, Finding of Fact ¶¶ 98, 106. Furthermore, electronic messages generally are not, and cannot practically be, disseminated by use of verified credit cards. Adopting a verified credit card or "adult access code" system for such non-fee communications would be prohibitively expensive for most businesses;[33] it would also change the nature of the communication and decrease access to the speech and information at issue.[34] It might not even be feasible.[35]

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[33] *See, e.g.*, 929 F. Supp. at 846, Finding of Fact ¶ 99 (credit card verification costs the provider $1 for each transaction).

[34] *See ACLU v. Reno*, 929 F. Supp. at 847, Finding of Fact ¶ 106 ("evidence suggest[s] that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password"); *id.* at 846, Finding of Fact ¶ 101 ("[c]redit card verification would significantly delay the retrieval of information on the Internet," which would inhibit use and stifle access).

[35] *See ACLU v. Reno*, 929 F. Supp. at 846, Finding of Fact ¶ 98 ("The Government's expert 'suspect[ed]' that verification agencies would decline to process a card unless it accompanied a commercial transaction. There was no evidence to the contrary.").

Second, even if far more extensive reliance on "verified credit card" uses were feasible, the effect would be to deny many adults access to constitutionally protected speech. "Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *ACLU v. Reno,* 929 F. Supp. at 846, Finding of Fact ¶ 102. Unlike other contexts in which "verified credit card" requirements might be considered, moreover, adults denied access to significant information on the Internet by a credit card requirement would be obstructed from participating in this "unique and wholly new medium of worldwide human communication." *Id.* at 844, Finding of Fact ¶ 81.[36]

Accordingly, the defenses relied on by the government are inadequate to salvage the statute. They are neither economically nor technologically feasible in many circumstances. Even more fundamentally, the "defenses" cannot provide the missing clarity or narrowness about what the statute itself proscribes. The defenses cannot provide the standard that would give business users of interactive computer networks an appropriate understanding of the circumstances in which deployment of specified

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[36] For reasons similar to those involving verified credit cards, other adult verification requirements also generally are not practicable or economical. *See ACLU v. Reno*, 929 F. Supp. at 854 (Sloviter, C.J.) ("non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and . . . even if they could attempt to age verify, there is little assurance that they could successfully filter out minors."); *see also id.* at 846-48, Finding of Fact ¶¶ 97-116.

"defenses," even if they were otherwise economically and technologically feasible, would be necessary or relevant.[37]

The distinguishing characteristics of the Internet and other interactive computer services are their openness, universality, and accessibility. Taken together, the standards and defenses of the CDA are fundamentally antithetical to these qualities. The Act would leave businesses with a stark and unpalatable choice: substantially increased silence and self-censorship or aggressive efforts to drastically limit the potential audience of any communication. The former option would muzzle valuable communications and harm competitiveness. The latter option would attempt to transform the vast, accessible Internet to an outmoded single-line, point-to-point conception of telecommunications with an identified speaker and identified listener; it would threaten the very nature of the Internet and interactive computer services, and imperil their role as a free and open participatory marketplace of expression.

[37] The "employer/employee" defense provided in section 223(e)(4) (47 U.S.C. § 223(e)(4)) provides some insulation from liability for the actions of rogue employees, but it falls far short of providing a complete defense or resolving the statutory problems for businesses, particularly in view of the excessive breadth and vagueness of the criminal standard.

CONCLUSION

Protecting children is a laudable and important objective. Unfortunately, however, the Communications Decency Act fails to achieve that objective in a constitutionally permissible manner. The effect of the statute would be to endanger a broad range of permissible and desirable speech, and to inhibit the development of a dynamic, rapidly evolving communications medium.

The judgment of the district court should be affirmed.

Respectfully submitted,

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